90-1741

Supreme Court, U.S.
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No. 90-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

BAYERISCHE HYPOTHEKEN- UND WECHSEL- BANK AG
and
DR. BRUNO M. KÜBLER, as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG,
Petitioners,

v.

DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany, and EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Whether Section 53-7-91 of the Official Code of Georgia Annotated, as applied in this case to require the administrator of a Georgia estate to pay in full all Georgia claimants before making any distribution to German claimants regardless of the statutory priority of their claims, violates the equal protection clause of the fourteenth amendment to the United States Constitution by discriminating against the German claimants solely on the basis of their alienage.

2. Whether the estate distribution plan set forth in the superior court's order as to which review is sought interferes with the foreign relations of the United States and violates the Treaty of Friendship, Commerce and Navigation between the United States and Germany by discriminating against the German creditors of the estate solely on the basis of their alienage.

3. Whether *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908), should be overruled as inconsistent with this Court's equal protection jurisprudence.

LIST OF PARTIES

The parties to the proceedings below were:

(1) Appellant Bayerische Hypotheken- und Wechsel- Bank AG ("Hypo Bank")*;

(2) Appellant Dr. Bruno M. Kübler in his capacity as Trustee in Bankruptcy for Westaufbau GmBH and Westaufbau Grundbesitzanlagen GmBH & Company KG;

(3) Appellee Dr. Klaus Hubert Görg in his capacity as the German Trustee in Bankruptcy; and

(4) Appellee Edgardo Parungao, Administrator CTA of the Georgia Probate Estate of Günter Kaussen.

The respondents before this Court are:

(1) Dr. Klaus Hubert Görg in his capacity as the German Trustee in Bankruptcy; and

(2) Appellee Edgardo Parungao, Administrator CTA of the Georgia Probate Estate of Günter Kaussen.

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* Pursuant to Rule 28.1 Petitioner Hypo Bank lists A.B.D. Securities Corporation as its only United States based affiliate.

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BAYERISCHE HYPOTHEKEN- UND WECHSEL- BANK AG
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DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany, and EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners Bayerische Hypotheken- und Wechsel- Bank AG ("Hypo Bank") of Munich, Germany, and Dr. Bruno M. Kübler ("Kübler") in his capacity as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG, as creditors of the estate of Heinz Günter Kaussen, deceased ("Estate"), respectfully request that a writ of certiorari issue to review the January 10, 1991, rulings by the Supreme Court of Georgia affirming without opinion the order of the Superior Court of Fulton County, Georgia dated April 4, 1990.

OPINIONS BELOW

Reprinted copies of the Findings of Fact and Conclusions of Law ("Findings") and Judgment of the United States Bankruptcy Court for the Northern District of Georgia in *In re Goerg*, Case No. A86-04341-ADK, dated July 31, 1989, are attached hereto as Appendices A and B.

A reprinted copy of the Order of the Superior Court of Fulton County, Georgia, dated April 4, 1990, ("Order") is attached hereto as Appendix C.

A reprinted copy of the Judgment of the Supreme Court of Georgia, dated January 10, 1991, affirming without opinion the lower court's Order, is attached hereto as Appendix D.

Reprinted copies of the denials of Petitioners' Joint Motion for Reconsideration by the Supreme Court of Georgia, dated January 30 and 31, 1991, are attached hereto as Appendices E and F.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on January 10, 1991. Petitioners' timely joint motion for reconsideration was denied by separate orders on January 30 and 31, 1991. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourteenth amendment, United States Constitution.

> "[N]o state shall make or enforce any law which shall ... deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." U.S.C.A. Constitutional Amendment 14, Section 1.

2. Section 53-7-91 of the Official Code of Georgia Annotated. Claims against the estate of a decedent shall rank in the following order:

> (1) Year's support for the family;
>
> (2) Funeral expenses, whether or not the decedent leaves a surviving spouse, in an amount which corresponds with the circumstances of the decedent in life, including physician's bill and expenses of the last sickness. If the estate is solvent, the administrator or executor is authorized to provide a suitable protection for the grave of the decedent;
>
> (3) The necessary expenses of administration;
>
> (4) Unpaid taxes or other debts due the state or the United States;

(5) Debts due by the decedent as executor, administrator, or guardian for an estate committed to him as such, or any debt due by the decedent as trustee, when he has had actual possession, control, and management of the trust property;

(6) Judgments, mortgages, and other liens created during the lifetime of the decedent, to be paid according to their priority of lien. Mortgages and other liens on specific property shall be preferred only to the extent of such property;

(7) Debts due for rent;

(8) All liquidated demands, including foreign judgments, dormant judgments, bonds, all other obligations in writing for the payment of money, promissory notes, and all debts the amount due on which was fixed and ascertained or acknowledged in writing prior to the death of the decedent; and

(9) Open accounts.

A copy of the Treaty of Friendship, Commerce and Navigation between the United States and Germany, dated October 29, 1954, is attached hereto as Appendix G.

STATEMENT OF THE CASE

> "It is only by not paying our bills that one can hope to live in the memory of the commercial classes."
>
> -- Oscar Wilde

A. The Kaussen Probate Proceedings.

Heinz Günter Kaussen ("Kaussen"), a German landlord known variously as *"Der Miethai"* (the rent shark) and the "German Howard Hughes," died a suicide on April 14 or 15, 1985, in Cologne, Germany.[1] During his lifetime, Kaussen had amassed substantial assets (mostly apartment houses and office buildings in Germany, Canada, California and Georgia) but also even more substantial debts. At his death, Kaussen's worldwide debts, including more than DM 129,000,000 (roughly $76 million[2]) owed to Hypo Bank, exceeded his assets by more than DM 121,000,000.

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[1] *Chicago Tribune*, April 18, 1985, at C-14. *See also Los Angeles Times*, April 16, 1985, part 2, at 6. Just as Kaussen's life and sordid death brought him notoriety in the popular press, the legal proceedings involving his estate have repeatedly been featured in international legal periodicals and the case is followed with interest in Europe, where it has been the subject of at least one symposium. *See, e.g.*, Hirte, *Der Kaussen-Kankurs vor US-amerikanischen Gerichten*, Zeitschrift für Wirtschaftsrecht 1493 (1989); Hanisch, *Erlöse aus der Teilnahme an einem ausländischen Parallel-Insolvenzverfahren - Ablieferung an die inländische Konkursmasse oder Anrechnung auf die Inlandsdividende?*, 10 Zeitschrift für Wirtschaftsrecht 273 (1989); and *Re Kaussen Estate*,64 Can. Bankr. Rep. 97 (1987).

[2] For comparison purposes, the Deutsche Mark closed on April 18, 1991, at 1.7040 Marks per U.S. dollar (i.e., 1 DM = 58.69 cents). The Wall Street Journal, April 19, 1991, at C-10.

Within weeks of Kaussen's death, his common-law wife, Ingeborg Skowronek,[3] initiated separate probate proceedings in Cologne, Montreal, San Francisco and Atlanta. Six months later in Cologne, the Kaussen Estate was adjudged bankrupt[4] and respondent Dr. Klaus Hubert Görg, a German lawyer, was appointed the German Trustee in Bankruptcy. To date there have been no distributions to unsecured creditors, and there is a substantial question as to whether anything will remain after payment of German taxes.[5]

While, and indeed before, proceedings commenced in Germany, the probate proceedings in Georgia and California began the orderly process of mustering and liquidating the Estate's considerable assets within each jurisdiction. Claims were filed (including claims by each of the Petitioners, who appeared in this country for that purpose, and claims on behalf of two other German banks); properties were sold; secured creditors and some small unsecured creditors were paid; and each estate ended up with approximately $6 million to $8 million in liquid assets before payment of fees and distribution to unsecured creditors (such as Petitioners).

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[3] By a three-sentence will dated January 19, 1963, Kaussen purportedly left his entire estate to Mrs. Skowronek except for a house that he left to his secretary.

[4] This had the effect of depriving Mrs. Skowronek of her claim. She promptly decamped to Montreal, where she remains.

[5] Petitioners have argued against delivering the Georgia and California estates to Dr. Görg on the grounds that such delivery would constitute a preferential disposition of assets to the German taxing authorities, contrary to *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14 (1964), and *Her Majesty, Queen in Right, etc. v. Gilbertson*, 597 F.2d 1161, 1163-66 (9th Cir. 1979). German law has long

B. Proceedings in the United States Bankruptcy Courts.

Not content with his uncertain standing in the Georgia and California probate proceedings as an agent for creditors, in June 1986 Dr. Görg attempted to gain control of the Georgia and California estates by filing petitions in the United States Bankruptcy Courts for the Northern District of Georgia and the Northern District of California for ancillary administration of the estates pursuant to Section 304 of the Bankruptcy Code. 11 U.S.C. § 304. (Section 304 permits foreign bankruptcy trustee to petition United States Bankruptcy Court in aid of foreign proceedings.) The California bankruptcy court abstained, so Dr. Görg took no appeal there, but when the Georgia bankruptcy court dismissed his petition on jurisdictional grounds Dr. Görg appealed to the United States District Court for the Northern District of Georgia, which affirmed, and to the United States Court of Appeals for the Eleventh Circuit, which reversed.[6]

Upon remand, the Georgia bankruptcy court held a two-day trial in June 1989 and determined not to commence a Section 304 proceeding. In so doing, the bankruptcy court entered findings of fact and conclusions of law (the

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recognized the same principle. *Judgment of April 27, 1912*, Oberlandesgericht, Hamm, Ger., 25 Rechtsprechung der Oberlandesgericht 333. The United States Bankruptcy Court in Atlanta found that, if theGeorgia and California estates were to be turned over to Dr. Görg, "most and perhaps all of these American assets would be paid to the West German taxing authorities to satisfy West German tax claims, to the exclusion of other creditors * * *." Findings ¶ 23, Appendix at 10a. Nevertheless, respondent Dr. Görg has sought both in the bankruptcy court, where he was rebuffed, and in the state courts of Georgia, where he was successful so far, to effect such a turnover of American assets.

[6] *In re Goerg*, 64 Bankr. 321 (Bankr. N. D. Ga. 1986), *rev'd.*, 844 F.2d 1562 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989).

"Findings," Appendix A, at 1a) in which it rejected Dr. Görg's contention that his commission under German law gave him universal authority to obtain control of all Kaussen's assets worldwide, found that German law respected foreign parallel collective proceedings such as the Georgia probate proceedings, and found that turning over the Georgia probate estate to Dr. Görg would mean that "most and perhaps all of these American assets would be paid to the West German taxing authorities to satisfy West German tax claims, to the exclusion of other creditors * * *." Findings ¶¶ 15, 20-25, Appendix at 7a-11a.

Dr. Görg appealed the bankruptcy court's decision to the United States District Court for the Northern District of Georgia, which dismissed the appeal as non-reviewable under 11 U.S.C. § 305(c) as it stood before its amendment by section 309 of the Judicial Improvements Act of 1990, Pub. L. 101-650, 104 Stat. 5089.[7] Dr. Görg's appeal from that dismissal is pending in the United States Court of Appeals for the Eleventh Circuit, where it was argued on March 11, 1991.

C. The Order At Issue.

In the midst of his appeal to the District Court, Dr. Görg returned to the Georgia state courts and moved the Superior Court of Fulton County, Georgia, for an order directing that creditors who are United States citizens be paid first and in full,[8] after which the remainder of the Georgia Estate would be turned over to Dr. Görg. The Superior Court, citing section 53-7-91 of the Official Code of Georgia Annotated ("O.C.G.A."), and without hearing any evidence on the validity of the various claims involved,

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[7] *See generally Matter of Axona Intern. Credit & Commerce Ltd.*, 924 F.2d 31, 33-36 (2d Cir. 1991).

[8] Such claims by American citizen creditors total $1.09 million, more or less.

issued the Order directing Administrator CTA Parungao to pay all American creditors in full and then turn over the balance of the estate ($8 million, more or less) to Dr. Görg "for determination under German law of the claims of all German creditors, including the claims of the German creditors who have filed in Georgia." Order, Appendix at 17a. The Order mandated an absolute preference in favor of the American creditors even though the claims of the German creditors (such as Petitioners) were of equal or greater priority.

Petitioners appealed to the Georgia Supreme Court, arguing, among other things, that: (1) the Order violated O.C.G.A. Section 53-7-91, which prescribes the pro rata payment of all creditors of an estate having claims of equal priority; (2) the Order violated the fourteenth amendment to the United States Constitution by discriminating against nonresident creditors solely on the basis of their alienage; and (3) the Order violated the Treaty of Friendship, Commerce and Navigation between the United States and Germany. The Georgia Supreme Court affirmed without opinion and denied Petitioners' motion for reconsideration. The affirmance endorses the preferential treatment of local creditors over foreign creditors, and has the effect of holding that such treatment does not violate the fourteenth amendment to the United States Constitution or the Treaty of Friendship, Commerce and Navigation between the United States and Germany.

REASONS FOR GRANTING THE WRIT

> A grant of priority rights to local creditors, whatever form it may assume, contradicts the principle of equality. It is legal isolationism, as incompatible with international commerce as economic or political isolationism. All countries are interested in the maintenance of equality among all creditors as a condition for

> international commercial relations. Protection of equality, therefore, is service to a common cause.

Nadelmann, *Foreign and Domestic Creditors in Bankruptcy Proceedings. Remnants of Discrimination?* 91 U. Pa. L. Rev. 601, 624 (1943).

Over two decades ago this Court observed, in striking down the discriminatory aspects of the probate law of Oregon, that the statute:

> [H]as a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems. The Oregon law does indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.

Zschernig v. Miller, 389 U.S. 429, 441 (1968). Today, two decades later, foreign investment in the United States totals almost $1.8 *trillion*, an increase of more than 700% since 1975.[9] It is no exaggeration to say that the treatment of aliens' claims is an issue of significant economic importance. But even if this were not a case that has attracted a great deal of international attention (see fn. 1 above), the unjustifiable discrimination against aliens, the lower courts' disregard of this Court's equal protection jurisprudence, the interference with foreign relations, and the violation of the United States' treaty obligations at issue here would warrant this Court's attention.

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[9] R. Scholl, *The International Investment Position of the United States in 1988*, Survey of Current Business, U.S. Department of Commerce, Bureau of Economic Analysis, 43 (June 1989).

ARGUMENT

A. The Application Of The Georgia Statute To Require That Domestic Claimants Are Paid In Full Before German Claimants Are Paid Anything Is A Forbidden Discrimination Based On Alienage.

A state statute neutral on its face but interpreted to permit exclusion of otherwise qualified claimants on the basis of alienage violates the fourteenth amendment.[10]

It is well settled that discrimination based on alienage violates the due process and equal protection clauses of the fifth and fourteenth amendments to the United States Constitution. *See Wong Wing v. United States*, 163 U.S. 228 (1896) (due process clause of fifth amendment applicable to aliens); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-374 (1886) (equal protection clause of fourteenth amendment applicable to aliens). Classifications based on alienage are "inherently suspect" and subject to strict judicial scrutiny, under which they can only be upheld if proved necessary to promote a "compelling state interest." *Graham v. Richardson*, 403 U.S. 365, 375 (1971). *See also Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

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[10] This Court has repeatedly held that the "state action" requirement is satisfied where, as here, a state court order commands a private person to take actions that would violate the United States Constitution if undertaken by the state. *See Shelley v. Kraemer*, 334 U.S. 1, 13-20 (1948). The Order in this case, which directs the administrator to make no distributions to German creditors of the Estate, patently constitutes an affirmative judicial requirement of discrimination based on alienage. As such, the Order constitutes state action, against which the German creditors are entitled to fourteenth amendment protection. *Cf. Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 488 (1988).

To be sure, this Court has sometimes found such a compelling interest, as in its "political function" cases involving governmental employees. *E.g., Cabell v. Chavez-Salido*, 454 U.S. 432, 439-40 (1982); *Ambach v. Norwick*, 441 U.S. 68, 72-80 (1979); *Foley v. Connelie*, 435 U.S. 291, 294-300 (1978).[11] But no such compelling interest is even remotely involved in this case. Georgia's interest here is less compelling than Texas' interest in ensuring that its notaries public know something of Texas law[12], Texas' interest in preserving its "limited resources for the education of its lawful residents,"[13] or California's interest in conserving a scarce resource by limiting commercial fishing licenses to persons eligible for citizenship[14]--all interests that this Court has found inadequate to justify discrimination against aliens.

There can be no question that Petitioners, as nonresident aliens claiming property within the United States, are entitled to equal protection of the laws. As Judge Friendly explained in *Sardino v. Federal Reserve Bank of New York*:

> The Government's second answer that "The Constitution of the United States confers no rights on nonresident aliens" is so patently erroneous in a case involving property in the United States that we are surprised it was

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[11] *See United States v. Verdugo-Urquidez*, __ U.S. __, 110 S.Ct. 1056, 1064 (1990), where the Court held that the fourth amendment, unlike the fifth, does not apply to property owned by a non-resident alien and located in a foreign country; the opinion distinguishes cases in which the alien comes "within the territory of the United States and developed substantial connections with this country."

[12] *Bernal v. Fainter*, 467 U.S. 216, 227 (1984).

[13] *Plyler v. Doe*, 457 U.S. 202, 227 (1982).

[14] *Takahashi*, 334 U.S. at 418.

> made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of Government within our borders--and even to some without. This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing they were protected by constitutional guarantees; today, for other reasons, we are still eager to attract foreign funds. In *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92, 51 S.Ct. 229, 75 L.Ed. 473 (1931), the Court squarely held that an alien friend is entitled to the protection of the Fifth Amendment's prohibition of taking without just compensation - even when his government was no longer recognized by this country. And the Court has declared unequivocally, with respect to nonresident aliens owning property within the United States, that they "as well as citizens are entitled to the protection of the Fifth Amendment."

361 F.2d 106, 111 (2d Cir. 1966) (citations and footnote omitted).

This Court has held that the equal protection clause of the fourteenth amendment applies to all persons 'within the jurisdiction' of the United States, including nonresident aliens. *Matthew v. Diaz*, 426 U.S. 67 (1976). *See Wong Yang Sun v. McGrath*, 339 U.S. 33 (1950). Hypo Bank is clearly 'within the jurisdiction' of the United States because it has long maintained an office in New York City. Further, by appearing in the courts of the United States and of Georgia and submitting to their jurisdiction, both Petitioners have placed themselves 'within the jurisdiction' of the United

States so as to be entitled to Constitutional protection. As this Court pointed out in a case presenting an analogous issue:

> The [equal protection] clause declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws", meaning, of course, the protection of laws applying equally to all in the same situation. The words 'within its jurisdiction' are comprehensive, but we have no need for attempting a full definition of them here. It is enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking.

Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544, 550 (1923). Thus, Hypo Bank's physical presence in this country and both Petitioners' claims against Kaussen's Georgia Estate bring them 'within the jurisdiction' of the United States and entitle them to fourteenth amendment protection.

B. The Georgia Order Interferes With Foreign Relations and Violates the Treaty Obligations of the United States.

Petitioners further contend that the Order violates the Treaty of Friendship, Commerce and Navigation entered into between the United States and Germany on October 29, 1954 (the "Treaty," Appendix at 22a). The Treaty mandates that both nations accord fair and equitable treatment to each other's nationals at all times (Article I,

paragraph 1), that property of each other's nationals shall not be taken, except for the public benefit and in accordance with due process and just compensation (Article V, paragraph 4), and that the nationals of each country shall receive equal treatment in the courts of the other country in pursuit and defense of their legal rights (Article VI, paragraph 1).[15]

The Order, as affirmed by the Georgia Supreme Court, denies Petitioners and the other German creditors of the Estate the right to participate pro rata in any distribution to their class of claims under the Georgia statute. As such, the Order violates the Treaty in several ways. First, the

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[15] Two years after the execution of the Treaty, Herman Walker, Jr., the draftsman and chief American negotiator thereof, commented on the purpose and effect of the Treaty as follows:

> [T]he basic rule to govern the conduct of such activities has long since been settled, in United States treaty practice, as "national treatment": that is, equality of treatment as between the alien and the citizen of the country. The former is thus entitled freely to carry on his chosen business under conditions of non-discrimination, and to enjoy the same legal opportunity to succeed and prosper on his merits as is allowed citizens of the country. It has become settled, that he and his property shall receive ... equal protection.

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 232 (1956). *See* Department of State Airgram A-105, January 9, 1976 (recognizing that Mr. Walker was responsible for formulation and negotiation of post-war Friendship, Commerce and Navigation treaties).

Order patently fails to grant the German creditors fair and equal treatment, as required by Article I, paragraph 1 of the Treaty.[16] Second, the Order denies the German creditors who have properly filed claims in Georgia equal access to Georgia courts in pursuit of their rights, in violation of Article VI, paragraph 1 of the Treaty.

This Court addressed a similar conflict between state probate law and a United States treaty in *Zschernig v. Miller*, 389 U.S. 429 (1968). In *Zschernig*, this Court was faced with an Oregon statute that regulated the ability of a nonresident alien to inherit property from an Oregon decedent. A citizen and resident of East Germany, who was held by the Oregon Supreme Court to be ineligible from inheriting the personalty of the decedent, appealed to this Court on the grounds that the Oregon statute violated the Treaty of Friendship, Commerce and Consular Rights of 1923 between Germany and the United States. This Court held the Oregon statute invalid, stating that when state probate law conflicts with a treaty, the state "must bow to superior federal policy." *Id.* at 441. The Court further held that if there are to be restraints on the ability of a nonresident alien to participate in United States estate administrations, such restraints must be provided by the federal government. *Id.*

Just as this Court struck the Oregon statute regulating the ability of a nonresident alien to inherit from an Oregon estate, so too should this Court strike down the Georgia court's Order mandating preferential treatment of local creditors over nonresident alien creditors asserting claims

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[16] As noted in the Bankruptcy Court's Findings, German law does not allow such discrimination on the basis of alienage. Findings, ¶24, Appendix at 10a.

of equal dignity. With foreign investment in the United States now approaching $1.8 trillion, the ability of a state court or legislature to make foreign policy regulating the payment of the claims of nonresident aliens is a significant issue that needs to be re-addressed by this Court through this case.

C. *Disconto Gesellschaft v. Umbreit* Should be Overruled.

In an earlier age, when equal-protection arguments were sometimes dismissed as "the usual last resort of constitutional arguments"[17] and now-unthinkable distinctions based on alienage and race were sincerely pressed,[18] the Court held that a state could, in resolving competing claims to a fund, prefer local creditors over alien creditors. *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908). This Court should re-examine that holding, which can no longer be reconciled either with this Court's treatment of aliens under the equal protection clause or with the Bankruptcy Code.

The facts of *Disconto* warrant brief mention. Gerhard Terlinden, alias Theodor Graefe, spent the first six months of 1901 uttering forged stock certificates to a number of unsuspecting victims, including the Disconto Gesellschaft ("Disconto") of Berlin,[19] then fled to Wisconsin, where in

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[17] *Buck v. Bell*, 724 U.S. 200, 208 (1927) (Holmes, J.).

[18] *See, e.g., Berea College v. Kentucky*, 221 U.S. 45 (1908) (Court found no equal protection violation in "An Act to Prohibit White and Colored Persons from Attending the Same School").

[19] *See generally Terlinden v. Ames*, 184 U.S. 270 (1902).

July, 1901, he deposited $6,420 in German money in the First National Bank of Milwaukee.[20] The next month Terlinden was arrested and held for extradition back to Germany. At this point, Disconto filed a tort action in Wisconsin against Terlinden, and the Umbreit of this story, attorney A.C. Umbreit, appeared for Terlinden.[21]

Meanwhile, back in Germany, bankruptcy proceedings against Terlinden began. Disconto was appointed a member of the committee of creditors, only to have its claim disallowed in the first days of 1902.[22] Nonetheless, Disconto agreed with the German trustee in bankruptcy to place into the German bankruptcy estate of Terlinden anything it recovered in Milwaukee.

Attorney Umbreit went on representing Terlinden both in his habeas corpus proceedings before this Court[23] and in Disconto's tort action. Terlinden lost the former in February 1902 and the latter in February 1904, when Disconto obtained a judgment for $94,145.11. The next month Umbreit sued Terlinden for attorney's fees and obtained a default judgment. Both judgments--Disconto's and Umbreit's --went unsatisfied, so both attempted to garnish the account at the First National Bank of Milwaukee.

The Wisconsin trial court rendered a judgment giving priority to Disconto's levy, but the Wisconsin Supreme Court reversed.[24] This Court affirmed the Wisconsin Supreme Court, holding that neither the doctrine of comity nor the

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[20] *Disconto*, 208 U.S. at 575.

[21] *Id.* at 576.

[22] *Terlinden*, 184 U.S. at 276.

[23] *Disconto*, 208 U.S. at 575-76.

[24] *Id.* at 577. *Disconto Gesellschaft v. Terlinden*, 127 Wis. 651, 106 N.W. 821 (1906)

Treaty of Commerce and Navigation of May 1, 1828, between Prussia and the United States (8 Stat. 378, T.S. 294) provided any reason to set aside:

> [T]he constant practice not to recognize assignments for the benefit of creditors outside the State, where the same come in conflict with the rights of domestic creditors seeking to recover their debts against local property. This is the doctrine in force against natives of the country residing in other states, and it is this doctrine which has been applied by the Supreme Court of Wisconsin to foreign creditors residing in Germany.

Disconto, 208 U.S. at 582.[25]

Since 1908 two controlling events have overtaken *Disconto* and drained it of whatever vitality it once had: first, the evolution of this Court's three-tiered equal protection standard and, second, the evolution and amendment of Title 11, United States Code, most notably through the addition of sections 304 and 305 by the Bankruptcy Reform Act of 1978.

Equal Protection. *Disconto* was based on the proposition that international comity is discretionary so that, in the absence of an explicitly contrary legal obligation, a state is free to prefer the claims of its citizens over the competing claims of aliens. International comity is still discretionary,[26] but equal protection doctrine has come a

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[25] *Id.* at 582. In particular, this Court denied that the 1828 Treaty gave Disconto any right not to be disadvantaged on account of its alienage. It is doubtful that this Court would reach the same result today. As noted in part B of this argument, the 1954 Treaty, which replaced the 1828 Treaty, mandates equal treatment and equal access to the courts.

[26] This is elementary. *See, e.g.*, J.G. Starke, *Introduction to International Law* 19-20 (9th ed. 1984).

long way since 1908. The "constant practice" referred to in *Disconto* came to an end, at least domestically, in 1923 with this Court's decision in *Kentucky Finance Corp.*, 262 U.S. at 550. Since 1923, however, the practice of discriminating against alien creditors, though just as suspect, has never received this Court's attention despite the evident impossibility of reconciling it with the "strict scrutiny" that this Court today gives to laws that discriminate against aliens. *E.g., Plyler*, 457 U.S. at 227. In *Disconto*, this Court, based on the absence of any statute or treaty specifically prohibiting the distinction, permitted Wisconsin to prefer its own citizen over an alien in a creditor's rights matter of no significance to the governance of the state. Today, such a distinction could not possibly pass constitutional muster.

The Bankruptcy Code. Even before the 1978 reform act, the bankruptcy laws of the United States did not countenance discrimination against aliens of the type permitted in Disconto. In the most recent appellate opinion to cite *Disconto*, *Banque de Financement v. First Nat. Bank of Boston*, 568 F.2d 911, 921 (2d. Cir. 1977) (*"Finabank"*), the bankruptcy court, followed by the district court, had cited *Disconto* for the proposition that the Bankruptcy Act endowed it with discretion to dismiss United States bankruptcy proceedings ancillary to foreign domiciliary proceedings when necessary in order to give American claimants priority over foreign creditors. The Court of Appeals reversed, holding:

> Section 2a(22)[27] was not intended to be the instrument by which jurisdiction over a foreign domiciliary grounded in § 2a(1) could be undercut for the purpose of validating preferential transfers to United States nationals. Section 2a(22) was enacted as an administrative reform. It was designed to avoid needless duplication of efforts by courts and creditors in those cases where an ancillary proceeding in this country could be coordinated with or entirely dismissed in favor of a domiciliary proceeding abroad.

Finabank, 568 F.2d at 921

The Second Circuit did not address *Disconto* specifically (merely noting that the bankruptcy court had cited it); instead, it held, in effect, that section 2a(22) of the Bankruptcy Act had overtaken *Disconto*. *Disconto* should not be resuscitated to control this case.

The legislative history of the adoption of Section 304 of the Bankruptcy Code--which allows representatives of foreign bankruptcy estates to engage the provisions of the Code to ensure equal treatment of foreign and domestic creditors--is instructive as to the modern status of the doctrine of comity. During the decade preceding adoption of the Bankruptcy Code, creditor equality had replaced comity as the guiding force in American bankruptcy courts' treatment

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[27] Bankruptcy Act section 2a(22) permitted bankruptcy courts to:

> Exercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States.

11 U.S.C. § 2a(22) (1970).

of foreign claimants. *See, e.g., Finabank*, 568 F.2d at 911; and *Israel-British Bank Ltd. v. Federal Deposit Insurance Corp.*, 536 F.2d 509 (2d Cir. 1976). In the early drafts of Section 304, comity was completely omitted from the list of factors to be used by courts in evaluating whether to recognize foreign claims.[28] Similarly, comity was disregarded as a relevant consideration in both the initial House and Senate versions of Section 304.[29] It was not until the final version of the bankruptcy reform legislation that comity was even included as one of six factors to be considered in deciding whether to commence a Section 304 proceeding.[30] Clearly, then, the enactment of Section 304 in effect dethroned comity--which had been the sole foundation for the *Disconto* decision--in favor of the objective of creditor equality as the primary mission of courts and Congress in addressing claims of foreign creditors.[31] The time has come to overrule *Disconto*. It is, quite simply, no longer acceptable for states to discriminate against claimants on the basis of alienage. The *Finabank* court recognized this, as does this Court's modern equal protection doctrine. Whatever the rule in 1908, today alien creditors present in the United States are entitled to the equal protection of the laws.

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[28] Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137 (Part II), 93rd Cong., 1st Sess. 69-71 (1973)(hereinafter "Commission Report").

[29] *See* H.R. 8200, 95th Cong., 1st Sess. § 304 (1977); S. 2266, 95th Cong., 2d Sess., § 304 (1978).

[30] 124 Cong. Rec. H 32391-32420 (Sept. 28, 1978).

[31] *See* Commission Report at 71.

CONCLUSION

For the reasons stated, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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Appendix A

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER
	:	
KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the ESTATE OF HEINZ GUENTER KAUSSEN, pursuant to the law of the Federal Republic of Germany,	:	A86-04341-ADK
	:	IN PROCEEDINGS
	:	UNDER THE
Debtor.	:	BANKRUPTCY CODE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The matters under consideration in this case are (a) Amended Restated Petition by German Bankruptcy Trustee for Ancillary Administration Pursuant to 11 U.S.C. § 304 filed by Dr. Klaus Hubert Goerg ("Dr. Goerg"); (b) Motion for Interim Stay filed by Dr. Klaus Hubert Goerg; (c) Motion for Summary Judgment filed by John F. Sampson; (d) Motion for Dismissal or Abstention filed by Bayerische Hypotheken-und Wechsel-Bank AG ("Hypo-Bank"); (e) Motion for Abstention, Dismissal or Denial of Relief filed by Dr. Bruno M. Kubler; and (f) Motion for Abstention, Dismissal or Denial of Relief filed by John F.

Sampson. This court conducted a two-day trial on these matters on June 27 and 28, 1989.

At trial, the court heard expert and factual testimony from Dr. Goerg personally, and from Dr. Bruno M. Kubler ("Dr. Kubler") in his capacity as trustee in bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Co. KG. Dr. Kubler and Hypo-Bank presented expert testimony on German insolvency law from Professor Hans Hanisch, Professor of Law at the University of Geneva, Switzerland, and from Professor Stefan A. Riesenfeld, Professor of Law at the University of California at Berkeley and at the University of California-Hastings College of Law. In his rebuttal case, Dr. Goerg presented Dr. Hans-Jochem Lueer, Dr. Goerg's law partner who Dr. Goerg retained as counsel in this matter, as his expert witness on these matters.

FINDINGS OF FACT

Based on this court's review of the record in this case, the stipulations of the parties contained in the Consolidated Pretrial Order dated June 22, 1989, and the testimony and evidence presented at trial, the court finds as follows:

1. Heinz Guenter Kaussen ("Kaussen") died on or about April 13, 1985 in Cologne, West Germany. The sole heir to his will under German law was Mrs. Ingeborg Skowronek, his "life companion." He also left four children, all of whom were minors at his death, but only one of whom is now a minor.

2. At the time of his death, Kaussen was a citizen and resident of the Federal Republic of Germany ("West Germany"), and his estate consisted primarily of assets located in West Germany. His estate also included assets located in Ireland, Canada, Georgia, and California. The majority of his creditors, both in number and monetary

amount, were located in West Germany. At present, the majority of Kaussen's assets are in North America.

I. BACKGROUND OF THE WEST GERMAN PROCEEDINGS

3. On May 28, 1985, the Cologne Local Court issued a Probate Certificate recognizing Mrs. Skowronek as the sole heir. On July 17, 1985, upon the application of Mrs. Skowronek, the Cologne Local Court ordered the administration of the Kaussen estate and appointed Hermann Haeck administrator. The court also appointed Karl-Heinz Maus as joint administrator.

4. On November 13, 1985, the two administrators petitioned the Cologne Local Court for the opening of bankruptcy proceedings on the basis that the estate was insolvent.[1] On November 15, 1985, the court ordered the estate sequestered and appointed Dr. Goerg as sequestor. On December 13, 1985, Dr. Goerg reported to the court that the estate was insolvent and that there were grounds for bankruptcy. The representative of Mrs. Skowronek and the children objected to Dr. Goerg's report, and the Bankruptcy Division of the Cologne Local Court appointed an independent expert to review the appraisal. After the independent expert submitted his report, the Bankruptcy Division of the Cologne Local Court rendered an Order on January 24, 1986 adjudicating the Kaussen estate insolvent

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[1] In West Germany, a decedent's estate can be administered under the bankruptcy laws. This is not so in the United States, where a decedent's estate cannot be a debtor under the Bankruptcy Code, except through Section 304. *See In re Goerg*, 64 Bankr. 321 (Bankr. N.D.Ga. 1986), *rev'd*, 844 F.2d 1562 (11th Cir. 1988).

and appointing Dr. Goerg as the bankruptcy trustee of the Kaussen estate. The Cologne Local Court's order was affirmed on appeal by the Cologne Regional Court on February 17, 1986, and by the Cologne Higher Regional Court of Appeals on March 3, 1986, and on April 28, 1986. The German Federal Constitutional Court, on June 6, 1986, refused to review the appeal.

II. BACKGROUND OF THE CALIFORNIA PROCEEDINGS

5. On April 26, 1985, Mrs. Skowronek nominated Peter Michael to serve as Administrator (and if necessary, Special Administrator) of the California estate. The same day, the Probate Department of the California Supreme Court, in and for the City and County of San Francisco ("California Superior Court"), appointed Peter Michael to serve as Special Administrator. On June 10, 1985, the California Superior Court appointed James R. Scannell, the Public Administrator for the City and County of San Francisco, as the Administrator with will annexed of the California estate and denied the heirs' petition asking that Peter Michael be named as Administrator with will annexed. On March 24, 1987, the California Court of Appeal, First Appellate District, Division 5, reversed the Order. Thereafter, the California Supreme Court denied a petition to hear the Public Administrator's appeal. On July 15, 1987, the California Superior Court granted the heirs' petition appointing John F. Sampson as Administrator of the California estate.

6. All of Kaussen's assets in California have been liquidated. As of March 27, 1989, the California Administrator had $7,722,650 on hand. After subtracting tax refunds due the Georgia estate in the amount of $1,595,729 pursuant to the Foreign Investors in Real Property Tax Act ("FIRPTA"), 26 U.S.C. § 897, there is $6,126,921 in the California estate. Administrative expenses asserted to date and

expected to be asserted in the future total approximately $1,275,000.

7. If all anticipated administrative expenses are paid in full, the California Administrator will have approximately $4,850,000 available for distribution to creditors.

8. Sixty-six creditors' claims were filed against the Kaussen California probate estate. Of these, ten were rejected and no lawsuits were filed contesting the rejection. Another ten claims were withdrawn by the creditors. Twenty-five were recognized and paid with no dispute. Eleven claims were settled and paid after lawsuits were filed. Four claims are by German creditors, Deutsche Kreditbank, Deutsche Hypothekenbank Frankfurt-Bremen, Hypo-Bank, and Dr. Kubler. Another three claims belong to tenants, but these claims are currently dormant. Cornish & Carey Commercial filed a claim that has been settled for approximately $100,000. This sum has yet to be paid out of the estate. The remaining claim belongs to a decedent's estate in California which has not yet decided whether to continue pursuing the claim.

III. BACKGROUND OF THE GEORGIA PROCEEDINGS

9. In May 1985, a Probate Administration of Kaussen's Georgia assets was begun in Georgia. Eric Ranney was originally appointed temporary administrator of the Georgia Probate estate on May 31, 1985. On July 17, 1985, Edgardo L. Parungao ("Parungao") succeeded Ranney as Probate Administrator.

10. At the time the Georgia probate proceeding was initiated, the assets located in Georgia consisted primarily of 21 parcels of real estate. To date, all of the Georgia real estate has been sold except one parcel.

11. All U.S. Federal tax claims in any way involving the Kaussen estate have been resolved and paid.

12. The total dollar amount claimed by unpaid U.S. creditors who filed claims in Georgia is $1,089,045.29. In addition, German creditors are asserting claims in the Georgia Probate Court of DM 185,832,260.85 [Deutsche Marks].[2]

13. At present, the Georgia Probate Administrator has $7,014,729. This figure included the FIRPTA funds yet to be received from the California Administrator, but does not include the equity in the remaining parcel of real estate.

IV. THE GERMAN CREDITORS

14. Four German creditors have filed claims in the German Bankruptcy Proceedings, the California Probate Proceeding, and the Georgia Probate Proceeding. Three of these creditors are banks organized under the laws of the Federal Republic of Germany: Deutsche Hypothekenbank Frankfurt-Bremen, Deutsche Kreditbank, and Hypo-Bank. The fourth creditor is Dr. Kubler, in his capacity as trustee in bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Co. KG. The status of the claims of these creditors in each of these proceedings is as follows:

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[2] For comparison purposes, on June 28, 1989, the West German Deutsche Mark closed the business day trading at .5102 U.S. Dollars per Mark. *See The Wall Street Journal*, Friday, June 30, 1989, page C13.

Deutsche Hypothekenbank Frankfurt-Bremen and Deutsche Kreditbank: Dr. Goerg, as the German bankruptcy trustee, has recognized the claims of these two banks as practically uncontested. Parungao, the Georgia Probate Administrator, has indicated to the Probate Court of Fulton County that he has obtained the opinion of German counsel that the claims are valid under German law and not subject to any significant defenses. John F. Sampson, as the California Probate Administrator, has contested these claims. As a consequence, both banks have filed suits in California that Sampson is defending.

Hypo-Bank: Dr. Goerg has yet to make a final accounting of this bank's claim in West Germany. In Georgia, Parungao has indicated to the Probate Court of Fulton Court that he has obtained the opinion of German counsel that the claim is valid and not subject to any significant defenses. In California, Sampson has contested the claim. As a consequence, the bank has filed two suits in California that Sampson is defending.

Dr. Bruno M. Kubler: Two of Dr. Kubler's three claims are presently being litigated in Germany. There the Cologne Regional Court reached a decision regarding two of the claims on May 5, 1989, and an appeal was taken therefrom on June 13, 1989. Dr. Goerg has acknowledged a third claim for DM 10,000,000.00. Dr. Kubler is asserting these same three claims in the California Superior Court. In the Georgia Probate Proceeding, Dr. Kubler filed a claim in the amount of DM 71,818,974.

15. Several German tax authorities have filed claims against the Kaussen estate in Germany in the approximate amount of DM 54,000,000. These German tax authorities have not filed any claims against the Kaussen estates in Georgia or California. The West German tax authorities have asserted that virtually all of their claims are entitled to priority over other creditors' claims pursuant to Section

61(2) of the West German Bankruptcy Act ("Konkursordung", or "KO"). Negotiations regarding tax priorities appear to be ongoing but yet unresolved and contingent. See Goerg Exhibit 46.

V. BACKGROUND ON ANCILLARY PROCEEDINGS IN THE UNITED STATES

16. On June 13, 1986, Dr. Goerg filed a petition for ancillary administration in this court pursuant to Section 304 of the Bankruptcy Code. That petition sought turnover of the Georgia estate and an injunction enjoining the Georgia administrator from continuing to administer Kaussen's Georgia estate. On August 26, 1986, this court dismissed the petition for lack of jurisdiction, finding that Dr. Goerg, as a representative of an insolvent decedent's estate, was not a "foreign representative" of a "foreign proceeding" as required by Section 304(a). *In re Goerg*, 64 Bankr. 321 (Bankr. N.D.Ga. 1986). On May 18, 1988, the Eleventh Circuit held that Dr. Goerg's status as a representative of an insolvent decedent's estate does not bar him from seeking relief under Section 304. *See In re Goerg*, 844 F.2d 1562 (11th Cir. 1988).

17. On or about July 2, 1986, Goerg filed a Petition by a Foreign Representative in a Case Ancillary to a Foreign Proceeding pursuant to Section 304 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of California. That petition sought turnover of the California estate to Dr. Goerg and an injunction enjoining the California administrator from continuing to administer the California estate of Kaussen. Dr. Goerg filed a declaration in support of a petition, to which he attached many of the West German court orders that were introduced as exhibits in this trial.

18. On or about October 6, 1986, and after a hearing, the United States Bankruptcy Court for the Northern District of California entered an order, supported by findings of fact and conclusions of law, abstaining pursuant to 11 U.S.C. § 305 and dismissing Dr. Goerg's petition under 11 U.S.C. § 304. Dr. Goerg took no appeal from this order, although there is a question of law as to whether such an order is appealable.

19. Based on the Eleventh Circuit's decision, Dr. Goerg filed an Amended and Restated Petition for ancillary administration with this court on October 24, 1988. In that Amended Petition, Dr. Goerg sought turnover of the assets in both Georgia and California and an injunction against both the Georgia and California administrators from continuing to administer Kaussen's assets. Dr. Goerg now seeks a turnover of assets from both California and Georgia after the respective probate administrators have paid all United States creditors and administrative expenses in full.

VI. GERMAN LAW

20. Dr. Goerg contends that the January 24, 1986 Order of Cologne Local Court authorized him to collect Kaussen's California and Georgia assets under the principle of "universality." That principle in West German bankruptcy law is that the West German estate includes all assets of the debtor, foreign or domestic, at least to the extent that foreign legal systems permit the West German bankruptcy trustee to assert a claim to the foreign assets of the debtor. That principle, however, is subject to certain qualifications and limitations. One such limitation is that West German law recognizes the superior claim of foreign (*i.e.*, non-German) parallel collective proceedings to liquidate assets in that foreign jurisdiction and distribute them to creditors under the laws of that jurisdiction.

21. West German law distinguishes parallel collective proceedings, which distribute a debtor's assets in accordance with the principle of equality (pro rata distributions to creditors with claims of equal priority), from individual enforcement of creditors' claims (such as attachments and garnishments) which distribute a debtor's assets in accordance with the principle of priority (first come, first served). West German law defers to foreign collective proceedings but not to individual efforts.

22. The Georgia and California probate proceedings qualify as parallel collective proceedings under West German law.

23. As noted in Paragraph 15 above, the West German taxing authorities, which have filed tax claims against the Kaussen estate in Germany in the approximate amount of DM 54 million, have asserted that their claims are entitled to a privilege or priority under KO § 61(2). This privilege or priority, if established, would mean that, with only very minor exceptions, such tax claims must be paid in full before any other creditors of the estate would receive anything. As a consequence, if this court were to order the turnover of the Georgia and California probate estates to Dr. Goerg, most and perhaps all of these American assets would be paid to the West German taxing authorities to satisfy West German tax claims, to the exclusion of other creditors unless said priorities were compromised. *See supra* Paragraph 15.

24. West German bankruptcy law, as set forth in KO section 5, requires the equal treatment of all creditors, regardless of citizenship and does not permit any discrimination between German and non-German creditors. Therefore, Dr. Goerg's request that this court order full payment to creditors who are citizens of the United States, no payment to creditors who are citizens of West Germany, and a turnover of the

net Georgia and California estates to the West German bankruptcy trustee, would violate in principle KO section 5.

25. Denial of relief to Dr. Goerg under section 304 will not leave him without remedies under West German law. Dr. Goerg may sue in West German Courts to recover any foreign assets obtained by a West German creditor which he alleges were obtained in violation of West German law. The West German Bankruptcy Court may also credit any foreign assets obtained by a West German creditor against the creditor's claim against the West German estate. These are matters to be determined by the West German Courts. Dr. Goerg may also attempt to obtain authority from West German creditors to file claims on their behalf in the Georgia probate proceedings and perhaps in the California probate proceedings. These are matters to be determined by the Georgia and California courts.

VII. THE GEORGIA AND CALIFORNIA PROBATE PROCEEDINGS

26. The Georgia and California probate proceedings fairly and adequately assure equitable distribution of the Kaussen estates in those jurisdictions.

27. The probate codes of Georgia and California provide for the distribution of proceeds of the Kaussen estates substantially in accordance with the order prescribed by Title 11 of the United States Code.

28. The Georgia and California probate proceedings have resulted in the liquidation of substantially all of Kaussen's assets in Georgia and California as well as the payment or settlement of most of the creditors' claims against the California estate.

29. While continuation of the Georgia and California probate proceedings will require continued employment of United States attorneys by the West German creditors and will consume judicial resources in the States of Georgia and California, the alternative of granting Dr. Goerg's section 304 petition would be even less economical and expeditious in that it would generate complicated and lengthy appeals, consuming the assets of the various estates, while prolonging the Georgia and California probate proceedings, which have moved far along towards conclusion.

30. As noted in paragraphs 17 and 18 above, Dr. Goerg also filed a section 304 petition in the United States Bankruptcy Court for the Northern District of California but that court abstained and Dr. Goerg took no appeal.

31. Were this court to grant Dr. Goerg's section 304 petition, it ought to exercise jurisdiction over both the Georgia and the California probate estates. That, however, may be precluded by the previous unappealed decision of the United States Bankruptcy Court for the Northern District of California.[3]

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[3] Sampson raised the issues of collateral estoppel, res judicata and jurisdiction with respect to the California Bankruptcy Court orderand the California assets in his motion for summary judgment. Sampson also raised the issue whether venue over the California assets and proceedings would be proper in this Court. *See* 11 U.S.C. § 1410. Because this court elects to abstain in this proceeding, the court need not decide these issues.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the court has reached the following conclusions of law.

1. Granting Dr. Goerg's Section 304 petition will not best assure an economical and expeditious administration of the Kaussen estate. 11 U.S.C. § 304(c). To the contrary, denial of Dr. Goerg's Section 304 petition will best assure an economical and expeditious administration of the Kaussen estate. *Id.*

2. Denial of Dr. Goerg's Section 304 petition is consistent with the just treatment of all holders of claims against or interests in the Kaussen estate. 11 U.S.C. § 304(c)(1).

3. Denial of Dr. Goerg's Section 304 petition will not expose claim holders in the United States to prejudice and inconvenience in the processing of their claims. 11 U.S.C. § 304(c)(2).

4. Granting Dr. Goerg's Section 304 petition is not necessary to prevent preferential or fraudulent dispositions of property of the Kaussen estate. 11 U.S.C. § 304(c)(3).

5. Granting Dr. Goerg's Section 304 petition is not necessary to assure distribution of proceeds of the Kaussen estate substantially in accordance with the order prescribed by Title 11. 11 U.S.C. § 304(c)(4).

6. Denial of Dr. Goerg's Section 304 petition is consistent with the doctrine of comity, which includes the concept of reciprocity. 11 U.S.C. § 304(c)(5).

7. The concept of a "fresh start" is irrelevant to this matter involving a decedent's estate. 11 U.S.C. § 304(c)(6).

8. In view of the foregoing, the court exercises its discretion pursuant to 11 U.S.C. § 305 to abstain from taking jurisdiction of Dr. Goerg's Section 304 petition.

9. In the alternative, the court exercises its discretion to dismiss Dr. Goerg's Section 304 petition.

IT IS SO ORDERED.

At Atlanta, Georgia, this 31st day of July, 1989.

/s/ A. D. Kahn
A. D. KAHN
UNITED STATES BANKRUPTCY JUDGE

Appendix B

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER
	:	
KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the ESTATE OF HEINZ GUENTER KAUSSEN, pursuant to the law of the Federal Republic of Germany,	:	A86-04341-ADK
	:	IN PROCEEDINGS
	:	UNDER THE
Debtor.	:	BANKRUPTCY CODE

JUDGMENT

This Court having entered Findings of Fact and Conclusions of Law in this matter with respect to the trial conducted June 27-28, 1989, on the following matters: the Amended and Restated Petition by German Bankruptcy Trustee for Ancillary Administration Pursuant to 11 U.S.C. § 304 filed by Dr. Klaus Hubert Goerg ("Dr. Goerg"); the Motion for Interim Stay filed by Dr. Klaus Hubert Goerg; the Motion for Summary Judgment filed by John F. Sampson; the Motion for Dismissal or Abstention filed by Bayerische Hypotheken-und Wechsel-Bank AG ("Hypo-Bank"); the Motion for Abstention, Dismissal or Denial of Relief filed by Dr. Bruno M. Kubler; and the Motion for Abstention, Dismissal or Denial of Relief filed by John F. Sampson;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that this Court **ABSTAINS** from exercising its jurisdiction over Dr. Goerg's Amended Petition pursuant to Section 305 of the Bankruptcy Code, and in the alternative this Court dismisses the Amended Petition;

FURTHER ORDERED AND ADJUDGED that the Motion for Abstention or Dismissal filed by Hypo-Bank, and the Motions for Abstention, Dismissal or Denial of Relief filed by Dr. Kubler and Mr. Sampson are **GRANTED** as provided in the Findings of Fact and Conclusion of Law;

FURTHER ORDERED AND ADJUDGED that Dr. Goerg's Motion for Interim Stay is **DENIED**; and

FURTHER ORDERED AND ADJUDGED that the Motion for Summary Judgment filed by Mr. Sampson, the California Administrator, is hereby rendered **MOOT**.

IT IS SO ORDERED.

At Atlanta, Georgia this 31st day of July, 1989.

/s/ A. D. Kahn
A. D. KAHN
UNITED STATES BANKRUPTCY JUDGE

APPENDIX C

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE:	:
ESTATE OF GUENTER	:
KAUSSEN,	: CIVIL ACTION
	: NO. D-22830
Deceased,	:

ORDER

This matter is presently before the Court on Motions for Summary Judgment filed on behalf of Edgardo Parungao, Administrator CTA of the Estate of Guenter Kaussen (the "Administrator"), and Dr. Klaus Hubert Goerg, the German bankruptcy trustee of the Estate of Guenter Kaussen. Attorneys for the Administrator also seek an award of additional attorneys' fees.

Both Motions for Summary Judgment seek the same relief, to wit: Direction to the Administrator to pay all valid claims filed in Georgia, except claims of German nationals, and to deliver the remaining proceeds of the estate to Dr. Goerg for return to Germany and the determination of the claims of German nationals.

The only objection to the Motions for Summary Judgment have been filed by two German creditors: Dr. Bruno M. Kubler, a German trustee in bankruptcy of two German entities of which Kaussen was a principal, and Bayerische Hypotheken-Wechsel Bank A.G. ("Hypo-Bank"), a German bank with claims against the Kaussen estate arising out of numerous transactions in Germany between Kaussen and the bank. The only objection to the request for additional attorneys' fees was filed by Hypo-Bank. After consideration,

the Court believes the Motions for Summary Judgment should be granted. Accordingly,

The Administrator is directed to pay in full all valid claims filed with the Administrator in the estate in the amounts allowed by the Administrator for such claims in accordance with the provisions of O.C.G.A. §53-7-91, except that the Administrator shall not pay any amounts on the following claims:

1. Dr. Bruno M. Kubler;

2. Deutsche Hypothekenbank Frankfurt;

3. Deutsche Kreditbank; and

4. Bayerische Hypotheken-Wechsel Bank A.G.

The Administrator's request for legal fees equal to the statutory fee for administration of the estate is denied. Counsel may petition this Court for reasonable fees to defend any appeal taken from this order through the appellate courts of Georgia and for services required in completing the administration of the estate.

The Administrator shall, after payment of all claims and expenses as above provided, deliver the remaining property in the hands of the Administrator to Dr. Goerg for determination under German law of the claims of all German creditors, including the claims of the German creditors who have filed claims in Georgia.

SO ORDERED, this 4th day of April, 1990.

/s/ Joel J. Fryer
HONORABLE JOEL J. FRYER
Judge, Fulton Superior Court

Appendix D

In the Supreme Court of Georgia

Decided: January 10, 1991

S90A1633. HYPOBANK ET AL. v. PARANGAO ET AL.

S90A1634. KUBLER ET AL. v. PARANGAO ET AL.

PER CURIAM.

Judgment affirmed without opinion pursuant to Rule 59. All the Justices concur.

Appendix E

SUPREME COURT OF GEORGIA

ATLANTA JANUARY 30, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S90A1634

BRUNO M. KUBLER ET AL. V. EDGARDO PARUNGAO ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

Appendix F

SUPREME COURT OF GEORGIA

ATLANTA JANUARY 31, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

Case No. S90A1633

BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK ET AL. V. EDGARDO PARUNGAO ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

Appendix G

EXCERPTS FROM THE

TREATY OF

FRIENDSHIP, COMMERCE AND NAVIGATION

BETWEEN

THE UNITED STATES OF AMERICA

AND

THE FEDERAL REPUBLIC OF GERMANY

[DATED OCTOBER 29, 1954]

The United States of America and the Federal Republic of Germany desirous of strengthening the bonds of friendship existing between them and of encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements promoting mutually beneficial investments, and establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of unconditional most-favored-nation treatment reciprocally accorded, and for that purpose have appointed as their Plenipotentiaries:

The President of the United States of America:

Mr. John Foster Dulles, Secretary of State of the United States of America, and

The President of the Federal Republic of Germany:

Dr. Konrad Adenauer, Federal Chancellor and Federal Minister of Foreign Affairs,

who, having communicated to each other their full powers found to be in due form, have agreed as follows:

ARTICLE I

1. Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests.

2. Between the territories of the two Parties there shall be, in accordance with the provisions of the present Treaty, freedom of commerce and navigation.

ARTICLE II

1. Nationals of either Party shall, subject to the laws relating to the entry and sojourn of aliens, be permitted to enter the territories of the other Party, to travel therein freely, and to reside at places of their choice. Nationals of either Party shall in particular be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital.

2. Each Party undertakes to make available the best facilities practicable for travel by tourists and other visitors with respect to their entry, sojourn and departure, and for the distribution of information for tourists.

3. Nationals of either Party, within the territories of the other Party, shall enjoy freedom of conscience; and

****

ARTICLE V

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to molestation or to entry without just cause. Official searches and examinations of such premises and their contents, when necessary, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

3. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights of interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied.

4. Property of nationals and companies of either Party shall not be taken within the territories of the other Party, except for the public benefit and in accordance with due process of law, nor shall it be taken without just compensation. Such compensation shall represent the equivalent of the property taken and shall be made in an effectively realizable form and without unnecessary delay. Adequate provision shall have been made at latest by the time of the taking for the determination and the giving of the compensation.

5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 4 of the present Article. Moreover, enterprises in which

nationals or companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

ARTICLE VI

1. Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

****

ARTICLE XXV

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

2. National treatment is accorded by the Federal Republic of Germany in the provisions of the Present Treaty in consideration of the national treatment accorded by the United States of America to the nationals, companies, products, vessels, or other objects, of the Federal Republic of Germany, with respect to the same subject matter.

3. National treatment accorded under the provisions of the present Treaty to companies of the Federal Republic of Germany shall, in any State, Territory, or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America.

4. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

5. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

6. Without prejudice to other methods of establishing nationality, a person in possession of a valid passport issued by the competent authorities of either Party, or a valid identity document named in the Protocol, shall be considered a national of that Party.